UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

STATE OF MISSOURI, *ex rel.* JOSHUA D. HAWLEY, Plaintiff, v. BRANSON DUCK VEHICLES, LLC, *et al*. Defendants.	)	Case No. 6:18-cv-03293-MDH

SUGGESTIONS IN SUPPORT OF MOTION TO REMAND AND FOR FEES AND COSTS UNDER 28 U.S.C. § 1447(c)

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INTRODUCTION

On July 19, 2018, the misconduct of Defendants and their employees led to the deaths of seventeen people on Table Rock Lake, including five children and seven senior citizens. Doc. 1-1, at 16-17. Missouri Attorney General Joshua D. Hawley ("the State") filed this state-law consumer-protection action in the Circuit Court of Taney County, Missouri, to hold Defendants Ripley Entertainment, Inc., and Branson Duck Vehicles, LLC (together, "Defendants" or "Ripley") responsible for their misconduct and to ensure that they do not harm Missouri consumers in the future. As detailed in the State's Petition, Ripley engaged in a series of flagrantly fraudulent, deceptive, and unfair trade practices under Missouri law, including but not limited to: (1) providing misleading and deceptive advertising that fraudulently concealed the risks of death and injury from participating in duck boat rides, Doc. 1-1, at 7-9; (2) providing misleading and deceptive advertising that targeted those most vulnerable to injury and death from duck boats, including children, the disabled, and the elderly, *id.* at 8-9; (3) concealing and failing to address the enhanced risks to consumers, especially to such vulnerable populations, *id.* at 7-12; (4) making false and deceptive statements that mischaracterized the construction history and safety of their duck boats, *id.* at 9; (5) fraudulently concealing from consumers that they were not authorized to operate duck boats in hazardous conditions, *id.* at 14; (6) adopting a ticket-refund policy that created an incentive for operation of their duck boats in hazardous conditions, *id.* at 14-15; (7) violating their representations of safety by deliberately operating the duck boats in deadly conditions for the purpose of commercial gain, *id.* at 14-15; (8) failing to advise consumers of basic safety measures and fraudulently advising passengers that life jackets and other safety equipment were not required for safety, *id.* at 19-20; and (9) violating numerous other provisions of law in the operation of

Stretch Duck 7, including the negligent operation of vehicles, endangering the welfare of children, assault, and involuntary manslaughter, *id.* at 22.

Faced with the Attorney General's impending request for an injunction to protect the public in state court, Ripley frivolously removed this case to federal court without any good-faith basis for asserting federal subject-matter jurisdiction. The removal constitutes a cynical attempt to hamper and delay the State's enforcement action. Ripley's legal maneuvers are designed to thwart judicial review of their actions and evade any court order that would bar them from resuming the operation of their deadly enterprise. The Court should promptly remand this case to state court and award fees and costs under 28 U.S.C. § 1447(c) to the State.

FACTUAL AND PROCEDURAL BACKGROUND

On August 31, 2018, the State filed its Petition in the Circuit Court of Taney County, Missouri, asserting six counts under the Missouri Merchandising Practices Act ("MMPA"). *See* Doc. 1-1 (state court Petition). The State did not assert any federal-law causes of action. *Id.* As discussed above, in the Petition, the State alleged that Defendants had engaged in an egregious series of false, misleading, fraudulent, and deceptive trade practices—including numerous fraudulent misrepresentations regarding the safety and capabilities of Defendants' vessels, and numerous unfair trade practices specifically targeting vulnerable populations such as children, the disabled, and the elderly. *See, e.g.*, Doc. 1-1, at pp. 7-8, 14-15. The Petition further alleged that Defendants made these fraudulent misrepresentations to induce consumers to purchase tickets for rides on Defendants' vessels and/or not seek refunds for those rides. *Id.* at pp. 16-18. As a direct result of Defendants' fraudulent misrepresentations and unfair trade practices, numerous consumers decided to go out on Table Rock Lake in one of Defendants' vessels on July 19, 2018.

Seventeen of those consumers died, including five children and seven persons aged 65 and older. *Id.* at 16-17.

On September 10, 2018, Defendants filed their Notice of Removal. Doc. 1.

ARGUMENT

This Court lacks subject-matter jurisdiction and must remand the case to state court. Moreover, Defendants lacked an objectively reasonable basis for removing this case to federal court, and their notice of removal serves only to hinder and delay the State's lawful enforcement action. The Court should order Defendants to pay the costs and fees incurred by the State as a result of the improper removal.

I. The Court Lacks Subject-Matter Jurisdiction Over This Matter and Thus Must Remand the Case to State Court Without Issuing Any Other Rulings.

A state-court action may be removed to federal court only if "the district courts of the United States have original jurisdiction" over that action. 28 U.S.C. § 1441(a). Where the district court lacks federal subject-matter jurisdiction over a removed case, the court must remand the case to state court. *See Cascades Dev. v. Nat'l Specialty Ins.*, 675 F.3d 1095, 1098 (8th Cir. 2012); 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case ***shall*** be remanded." (emphasis added)). "The party seeking removal has the burden to establish federal subject matter jurisdiction, and all doubts about federal jurisdiction must be resolved in favor of remand." *Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 924 (8th Cir. 2014) (quotation and brackets omitted).

Here, Defendants claim that the Court has federal-question jurisdiction over this case under 28 U.S.C. § 1331. *See* Doc. 1. The State's Petition asserted *only* state-law consumer-protection claims. *See* Doc. 1-1 (state-court Petition). The State did not bring any causes of action created by federal law. *Id.* Ordinarily, this fact alone would demonstrate that the Court lacks subject-

matter jurisdiction. Federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that "a federal question must appear on the face of the plaintiff's complaint in order to create federal question jurisdiction." *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 247 (8th Cir. 2012). "If the plaintiff's action is brought under state law, the case may not be removed under federal question jurisdiction even if federal law were to provide a defense, and 'even if both parties concede that the federal defense is the only question truly at issue.'" *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). Thus, the fact that the State brought only state-law claims ordinarily demonstrates that the Court lacks jurisdiction. *Id.*

Notwithstanding the clear directive of the well-pleaded complaint rule, Defendants nevertheless insist that the Court has jurisdiction under two theories. First, Defendants claim that federal law has completely preempted the State's claims, thereby establishing federal jurisdiction under the complete-preemption doctrine. Doc. 1, at p. 1-2. Second, Defendants assert that "adjudication of the State Action turns on a substantial question of federal law." *Id.* at p. 2.

These contentions are not only meritless; they are frivolous. As discussed below, the Court lacks subject-matter jurisdiction and should remand the case to state court.

A. The complete-preemption doctrine does not apply to this case.

As noted above, under the well-pleaded complaint rule, the existence of a federal defense to a state-law claim—even where the merits of that federal defense are the only contested issue in the case—does not establish federal-question jurisdiction. *Johnson*, 701 F.3d at 247. Federal preemption is an affirmative defense, and "[t]he rule that a federal defense does not create federal jurisdiction includes the defense of preemption." *Id.* However, in extremely rare cases, the complete-preemption doctrine provides that a federal statute converts *all* claims involving a certain subject—even those labeled as state-law claims—into federal causes of action. *Id.* Thus, where

the complete-preemption doctrine applies, federal courts have subject-matter jurisdiction under § 1331. *Id.*

Complete preemption applies only where "Congress intended a federal statute to provide 'the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" *Johnson*, 701 F.3d at 248 (quoting *Beneficial Nat'l Bank Ass'n v. Anderson*, 539 U.S. 1, 8 (2003)). The doctrine requires courts to conclude that a federal statute has "'extraordinary preemptive power,' a conclusion courts are reluctant to reach." *Id.* at 247 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Thus, "[c]omplete preemption is rare." *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1189 (8th Cir. 2015).

Here, several factors demonstrate that the complete-preemption doctrine does not apply in this case. First, the federal statutory regime invoked by Defendants provides no federal cause of action that could supplant the State's state-law causes of action. Second, nothing in the relevant statutes or their legislative history suggests that Congress intended to take the extraordinary step of replacing all state-law claims with federal causes of action. Third, fundamental principles of federalism strongly caution against finding complete preemption in this case. Fourth, even if the regulation invoked by Defendants could effect complete preemption—which it cannot—the claims brought by the State would fall outside the scope of that complete preemption. For all these reasons, the Court lacks subject-matter jurisdiction and must remand this case to state court.

1. Federal law has not created a substitute federal cause of action that would provide the State's exclusive cause of action.

Complete preemption applies *only* where "Congress intended a federal statute to provide 'the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" *Johnson*, 701 F.3d at 248 (quoting *Beneficial Nat'l Bank Ass'n*, 539 U.S. at 8). Where Congress has not provided a "substitute federal cause of action," "there is

an exceptionally strong presumption against complete preemption." *Griffioen*, 785 F.3d at 1189 (quotation omitted). "Without a private, federal cause of action for the conduct alleged in [the State's] petition, [Defendants] cannot rely on complete preemption to support federal jurisdiction." *Beard v. Aurora Loan Servs., LLC*, No. C-06-1142, 2006 WL 1350286, at *5 (S.D. Tex. May 17, 2006).

Here, neither the federal regulation invoked by Defendants nor the underlying federal statutory regime creates a cause of action under which the State could bring a claim. *See* 46 C.F.R. Part I, Subchapter T; 46 U.S.C. Subtitle II, Part B. Because federal law does not create *any* federal cause of action that the State could have brought, Congress could not have intended for "a federal statute to provide the exclusive cause of action," and Congress plainly did not "set forth procedures and remedies governing that cause of action." *Johnson*, 701 F.3d at 248 (quotation omitted).

This situation contrasts starkly with the only three federal statutes that the Supreme Court *has* found to effect complete preemption. *See Keller v. Bank of Am., N.A.*, 228 F. Supp. 3d 1247, 1253 (D. Kan. 2017) (identifying the three statutes that the Supreme Court has found to establish complete preemption). Each of those statutes—the Labor Management Relations Act, the Employee Retirement Income Security Act, and the National Bank Act—expressly creates a federal cause of action that an injured party can bring in lieu of state-law causes of action. *See* 29 U.S.C. § 185 (Section 301 of the LMRA, permitting federal-law actions for violations of labor contracts); 29 U.S.C. § 1132 (Section 502 of ERISA, providing federal-law action for ERISA violations); 12 U.S.C. § 86 (providing federal-law action for usury in violation of the National Bank Act). The absence of an express federal cause of action that the State could bring against Defendants provides strong evidence that Congress did not intend to completely preempt the State's claims here. *Griffioen*, 785 F.3d at 1189.

The possibility that the Coast Guard or some other federal regulator might take action against Defendants does not alter this analysis. Complete preemption requires that Congress must have given the state-law plaintiff—here, the State—a federal cause of action. *See Johnson*, 701 F.3d at 248. As noted above, federal law does not give the State any substitute federal cause of action. *See* 46 U.S.C. § 3318. The opportunity to request that federal regulators take enforcement action against defendants does not suffice to establish complete preemption. *See, e.g.*, *In re Dicamba Herbicides Litig.*, Case No. 1:18-md-2820, 2018 WL 2447792, at *5 (E.D. Mo. May 31, 2018) (holding that an express statutory avenue to request federal regulatory action did not suffice to establish complete preemption); *Kozar v. AT&T*, 923 F. Supp. 67, 72 (D.N.J. 1996) (rejecting complete preemption where federal cause of action could be brought only by federal regulator, not by the plaintiff in the removed case).

Moreover, federal enforcement action under Title 46 would not vindicate the rights and interests at issue in the State's claims in this case. For complete preemption to apply, "the federal remedy at issue must vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1207 (10th Cir. 2012) (cited approvingly in *Griffioen*, 785 F.3d at 1191). Here, enforcement action by federal regulators would not vindicate the rights and interests that the State seeks to vindicate. As an initial matter, an MMPA action under Mo. Rev. Stat. § 407.100 vindicates the State's sovereign interest in protecting the welfare of its citizens and residents. *See, e.g.*, *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009); *State of Missouri ex rel. Webster v. Freedom Fin. Corp.*, 727 F. Supp. 1313, 1317 (W.D. Mo. 1989). Asking federal regulators to take enforcement action would not vindicate this sovereign interest. Indeed, requiring such an avenue

would demean the State's sovereignty and violate principles of federalism by requiring the State to request the assistance of a separate sovereign.

In addition, the MMPA exists to protect consumers by preventing deceptive, fraudulent, unfair, and unscrupulous business practices. "The act's fundamental purpose is the protection of consumers, and, to promote that purpose, the act prohibits false, fraudulent or deceptive merchandising practices." *Huch*, 290 S.W.3d at 724 (internal citation and quotation marks omitted). Consistent with that statutory purpose, the State's MMPA claims address Defendants' false, misleading, and omitted disclosures to consumers made for the purpose of inducing those consumers to purchase tickets for duck boat rides. *See* Doc. 1-1. The Coast Guard's regulations address only boat and passenger safety. *See* 46 C.F.R. Chapter I, Subchapter T. The Coast Guard regulations do *not* prohibit false, deceptive, misleading, or unfair practices in connection with the sale of tickets on regulated vessels. *See id.* As a result, even if the Coast Guard were to fully enforce its own regulations, that federal enforcement action would not vindicate the consumer-protection interest in accurate and fair marketing that is central to the State's case. Thus, enforcement action by the Coast Guard would not "vindicate the same basic right or interest that would otherwise be vindicated under state law." *Devon Energy*, 693 F.3d at 1207.

2. The statutory text and legislative history do not reflect a congressional intent to replace state-law causes of action with an exclusive federal cause of action.

Complete preemption applies only where "Congress intended a federal statute to provide 'the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" *Johnson*, 701 F.3d at 248 (quotation omitted). "The ultimate touchstone guiding preemption analysis is congressional intent." *Griffioen*, 785 F.3d at 1189 (quotation omitted). A finding of complete preemption requires "palpable evidence that Congress

intended to displace completely a particular category of state-law causes of action." *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik*, 510 F.3d 77, 99 (1st Cir. 2007). Here, Defendants have not pointed to *any* evidence in the statutory text or legislative history to suggest that Congress intended to create a federal cause of action that would displace state-law causes of action in this field. Thus, complete preemption does not apply.

First, the text of Chapter 46 of the United States Code strongly counsels against finding a congressional intent to displace state-law actions in this area. As noted above, the federal statutes do not establish a substitute federal cause of action, and thus there is "an exceptionally strong presumption against complete preemption." *Griffioen*, 785 F.3d at 1189 (quotation omitted).

Moreover, in 46 U.S.C. § 4306, Congress expressly preempted state and local laws that differ in any way from Coast Guard regulations issued under § 4302 relating to recreational vehicles. *See* 46 U.S.C. § 4306. Such an express statement of congressional intent to preempt is the sort of evidence that arguably may support a finding of complete preemption. *See Griffioen*, 785 F.3d at 1189 (discussing the text of 49 U.S.C. § 10501(b)). In contrast, Congress chose not to include a similar preemption provision relating to regulations—like those in 46 C.F.R. Part 175—issued under other portions of Title 46. The preemption provision of 46 U.S.C. § 4306 demonstrates that Congress knows how to express the preemptive intent necessary for complete preemption. The fact that Congress opted not to include any comparable provision here provides strong evidence that Congress did not intend to establish complete preemption. *See, e.g., United States v. Lachowski*, 405 F.3d 696, 700 (8th Cir. 2005); *MM&S Fin., Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 364 F.3d 908, 911 (8th Cir. 2004); *see also In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000) ("Where Congress knows how to say something but chooses not to, its silence is controlling." (quotation and alteration omitted)).

Importantly, the text of 46 C.F.R. § 175.100 cannot establish complete preemption. "[O]nly Congress can completely preempt a state cause of action." *AmSouth Bank v. Dale*, 386 F.3d 763, 776 (6th Cir. 2004) (rejecting complete-preemption argument based on federal regulation). "While the agency can create federal law, it cannot expand federal jurisdiction." *Id.* at 777. The Constitution vests the power to delineate the jurisdiction of federal courts in Congress, not in Executive Branch entities like the Coast Guard. U.S. CONST. ART. III, § 1. Thus, regardless of any preemptive intent reflected in § 175.100, that regulation cannot effect complete preemption. *AmSouth*, 386 F.3d at 776-77. Moreover, the text of § 175.100 provides no evidence of congressional intent. "The CFR is a 'codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government.'" *Brooks-Powers v. Metro. Atlanta Rapid Transit Auth.*, 579 S.E.2d 802, 806 (Ga. App. 2003) (quoting page v of 49 CFR Parts 400 to 999). "As such, it is not authority for ascertaining congressional intent." *Id.*

Second, nothing in the legislative history of Chapter 46 reflects any congressional intent to establish a federal cause of action to displace state-law causes of action. Indeed, Defendants do not cite any federal legislative history at all. Instead, they cite only a notice in the Federal Register issued by the Coast Guard. *See* Doc. 1, at p. 3 (citing 77 Fed. Reg. 33,860 (June 7, 2012)). The Federal Register reflects actions of the Executive Branch, not the actions or expressions of the intent of Congress. *See, e.g.*, 44 U.S.C. §§ 1501, 1505. An agency's statement in the Federal Register cannot alter the intent expressed by Congress in a statute. *Tutein v. Daley*, 43 F. Supp. 2d. 113, 122 (D. Mass. 1999). As an Executive Branch agency, the Coast Guard cannot usurp Congress's legislative power under the Constitution. U.S. CONST. ART. I, § 1.

For the foregoing reasons, there is no evidence that "Congress intended a federal statute to provide 'the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.'" *Johnson*, 701 F.3d at 248 (quotation omitted).[1] Complete preemption does not apply, and the Court should remand this case to state court.

3. Federalism and comity considerations make complete preemption especially inappropriate in this case.

Courts have recognized that any application of the complete-preemption doctrine raises serious federalism concerns. *See, e.g., Johnson v. Am. Towers, LLC*, 781 F.3d 693, 701 (4th Cir. 2015); WRIGHT & MILLER, 14C FEDERAL PRACTICE & PROCEDURE § 3722.2 (4th ed.) ("Because of the obvious federalism implications of the complete-preemption doctrine, the courts have limited its application."). Those federalism concerns apply with particular force when, as here, complete preemption would defeat a State's exercise of sovereign power in a traditional area of state concern.

In this case, the State of Missouri has brought a consumer-protection enforcement action in its sovereign capacity under Mo. Rev. Stat. § 407.100. Consumer-protection and unfair-business-practice statutes fall squarely within the State's traditional regulatory and police powers. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990). And the State has a strong sovereign interest in enforcing its consumer-protection laws. *Cedar Rapids Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 879-80 (8th Cir. 2002). Federal courts are reluctant to find any preemption—let alone complete

[1] For the reasons stated above, the Coast Guard's intent is not relevant. Nevertheless, the State notes that nothing in the applicable regulations reflects any intent by the Coast Guard to create a substitute federal remedy that could replace state-law causes of action. Nor is there any evidence that the Coast Guard intended the preemption provisions of 46 C.F.R. § 175.100 to serve any purpose other than as an affirmative defense.

preemption—of States' regulation in areas of traditional state concern. "There is a presumption against preemption in areas of traditional state regulation[.]" *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005).

Thus, Defendants do not merely ask the Court to take the extraordinary and "rare" step of finding that Congress has wholly supplanted state law in connection with the sale of tickets to duck boat rides. *Griffioen*, 785 F.3d at 1189. They ask the Court to take that extraordinary step in a context in which there is a strong presumption against even ordinary preemption. *Wuebker*, 418 F.3d at 887. For the reasons stated above, the Court should decline that invitation. The complete-preemption doctrine does not apply in this case, and the Court lacks subject-matter jurisdiction. The Court should remand this case to state court.

4. Even if the applicable federal regulations could effect complete preemption, they would not preempt the State's claims here.

Even when a provision of federal law effects complete preemption, the complete-preemption doctrine permits removal only if the state-court case falls within the scope of the federal law's preemption provision. *See Griffioen*, 785 F.3d at 1190-91. Here, even if 46 C.F.R. § 175.100 were to effect complete preemption—which it does not and cannot—the State's claims do not fall within the scope of that preemption provision, for the reasons stated in the State's suggestions in opposition to Defendants' motion to dismiss, filed contemporaneously with this Motion. Thus, the Court lacks subject-matter jurisdiction and should remand this case.

B. The state-law causes of action in this case do not raise a substantial federal issue supporting federal-question jurisdiction.

Under the well-pleaded complaint rule, the fact that a plaintiff has asserted only state-law claims ordinarily suffices to demonstrate that there is no federal-question jurisdiction. *Johnson*, 701 F.3d at 247. However, the Supreme Court has recognized a very narrow exception to this

general rule. Federal-question jurisdiction can apply to "a state-law claim [that] necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 314 (2005). Because this case does not satisfy any of *Grable*'s requirements, it does not fall within the "special and small category" recognized in that case. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). The Court lacks subject-matter jurisdiction and should remand the case to state court.

1. The state-law causes of action here do not "necessarily raise" a federal issue.

Grable's first requirement is that a state-law cause of action "necessarily raise a stated federal issue." *Grable*, 545 U.S. at 314. Here, the State's state-law consumer-protection claims do not "necessarily" raise any federal issue, for at least two reasons. First, the mere fact that a violation of federal law supports a violation of state law does not create federal jurisdiction. The "ultimate question" in the State's MMPA claims is whether Defendants engaged in deceptive, fraudulent, and unfair commercial conduct within the meaning of Missouri law, not whether Defendants also violated federal law. *In re Volkswagen "Clean Diesel" Litig.*, Case No. MDL-2672, 2017 WL 2258757, at *10 (N.D. Cal. May 23, 2017) (holding that there was no federal jurisdiction over state consumer-protection actions alleging that Volkswagen had violated EPA regulations, explaining that "[w]hether Volkswagen's representations were unfair or deceptive is the ultimate question, not whether Volkswagen's vehicles violated EPA emissions regulations"). The mere fact that violation of a federal standard might support finding a violation of state law does not "necessarily raise" a federal question. *See, e.g., Maxwell v. Aurora Loan Servs., LLC*, Case No. 4:11-cv-1264, 2011 WL 4014327, at *2 (E.D. Mo. Sept. 9, 2011) (holding that an MMPA

claim did not establish federal-question jurisdiction where it relied on provisions of federal law to establish "a standard upon which to measure defendants' conduct"); *Hinton v. Landmark Dodge, Inc.*, Case No. 05-0850, 2006 WL 469525, at *1 (E.D. Mo. Feb. 23, 2006) (holding that an MMPA claim did not establish federal-question jurisdiction where it cited provisions of federal law as "a standard of care or conduct"); *Merrell Dow Pharmas. Inc. v. Thompson*, 478 U.S. 804, 806 (1986) (holding that a state-law claim did not create federal-question jurisdiction despite "the incorporation of a federal standard in [the] state-law private action"). Because the ultimate question in this case remains whether Defendants have violated the MMPA—not whether they have violated federal law—the case does not "necessarily raise" a federal issue. *In re Volkswagen "Clean Diesel" Litig.*, 2017 WL 2258757, at *10.

Second, as pled in the Petition, the State can prove each of its claims without showing any violation of federal law. Five of the State's six counts in the Petition do not invoke federal law as indicative of a violation of Missouri law at all. *See* Doc. 1-1, at pp. 24-29. Only one count in the Petition—Count I—expressly identifies violations of federal law as indicative of violations of Missouri law. *See id.*, at pp. 22-23. But Count I identifies numerous other ways that Defendants' conduct could have been "unfair" within the meaning of the MMPA, including by violating "§ 577.025 RSMo (Negligent operation of a vessel), § 565.024 RSMo (Involuntary manslaughter, first degree), § 565.027 RSMo (Involuntary manslaughter, second degree), § 69.050 RSMo (Endangering the welfare of a child in the second degree), § 565.056 RSMo (Fourth degree assault), § 306.22 RSMo (Personal flotation device, who must wear, when, exception)." *Id.*, at p. 23. Thus, the State plainly can prevail even on Count I without "necessarily" establishing a violation of federal law. Where a plaintiff could prevail on multiple theories, only some of which invoke federal law, the case does not "necessarily raise" a federal issue. *See, e.g., Lougy v.*

Volkswagen Grp. of Am., Inc., Case No. 16-1670, 2016 WL 3067686, at * 3 (D.N.J. May 19, 2016); *In re Lifelock, Inc., Litig.*, Case No. 08-1977, 2009 WL 2222711, at *5 (D. Ariz. July 24, 2009). Thus, Defendants cannot satisfy the first prong of *Grable*, and the Court lacks subject-matter jurisdiction.[2]

Importantly, the fact that Defendants intend to raise federal preemption as a defense in this case also does not "necessarily raise" a federal issue under *Grable*. *Grable* requires that the federal issue be raised by the "state-law claim." *Grable*, 545 U.S. at 314. Even under *Grable*, federal-question jurisdiction cannot be premised on an affirmative defense (such as preemption). "*Grable* does not alter the rule that a potential federal defense is not enough to create federal jurisdiction under § 1331." *Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001, 1003 (7th Cir. 2012); *see also Wilson v. Ethicon Women's Health & Urology*, Case No. 4:14-cv-13542, 2014 WL 1900852, at *3 (S.D. W. Va. May 13, 2014) ("Nothing in *Grable* can be reasonably understood to alter the long-standing notion that the basis for federal jurisdiction must appear on the face of the well-pleaded complaint."). "Federal jurisdiction cannot be predicated on an actual or anticipated defense[.]" *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009). The Court lacks subject-matter jurisdiction and should remand the case to state court.

2. This case does not present an "actually disputed" federal issue.

Grable's second requirement is that the necessarily raised federal issue must be "actually disputed." *Grable*, 545 U.S. at 314. "To raise an 'actually disputed' federal issue, a state cause

[2] Defendants' Notice of Removal notes the existence of a parallel federal law-enforcement investigation, but the Notice does not explain what Defendants believe to be the legal relevance of this fact. *See* Doc. 1, at p. 4. To the extent that Defendants suggest that the pendency of this parallel federal investigation affects whether the Court has subject-matter jurisdiction, they are mistaken. "*Grable* directs courts to examine the state-law claim itself, not whether legal or factual determinations in the state-law claim may also be implicated in a parallel federal proceeding." *Am. Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 544 (5th Cir. 2012).

of action must 'really and substantially involve a dispute or controversy respecting the validity, construction or effect of federal law.'" *Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250, 1256 (D. Or. 2011) (quoting *Grable*, 545 U.S. at 313) (brackets omitted). Where there is no indication that the parties disagree about the validity or interpretation of federal law, there is no "actually disputed" federal issue. *Id.*; *Hawai'i v. Abbott Labs., Inc.*, 469 F. Supp. 2d 842, 856 (D. Haw. 2006) (holding that because the removing party had not shown that the parties disagreed about the interpretation of the relevant federal provision, no "actually disputed" federal issue existed). A mere "factual inquiry" into whether a party complied with federal law does not involve an "actually disputed" federal issue. *Oregon ex rel. Kroger*, 832 F. Supp. 2d at 1256.

Here, Defendants do not argue that the State and Defendants disagree about the validity or interpretation of the provisions of federal law that the Petition alleges Defendants to have violated. *See* Doc. 1. Instead, this case presents the purely factual question of whether Defendants actually violated those federal laws. *See* Doc. 1-1. This "factual inquiry" does not present "a disputed legal question that could give rise to federal jurisdiction." *Oregon ex rel. Kroger*, 832 F. Supp. 2d at 1256. Thus, Defendants cannot satisfy the second prong of *Grable*, and the Court lacks subject-matter jurisdiction.

3. This case does not present a substantial federal issue.

Even if a state-law claim necessarily raises a federal issue and that federal issue is actually disputed, the federal issue still must be "substantial" to establish federal-question jurisdiction. *Grable*, 545 U.S. at 314. Several important factors demonstrate that any federal issue presented by the State's causes of action is not "substantial" within the meaning of *Grable*.

First, the resolution of any federal issues will not be "controlling in numerous other cases." *Empire*, 547 U.S. at 700. In *Grable*, the Supreme Court found a substantial federal issue, because

the case presented "a nearly pure issue of law, one that could be settled once and for all and thereafter would govern numerous [similar] cases." *Id.* (quotation omitted). Here, in contrast, the State's claims raise, at most, the question of whether Defendants violated certain Coast Guard regulations. *See* Doc. 1-1, at p. 23. Simply determining whether a person has violated a federal law does not present a "substantial" federal question. *See, e.g.*, *In re Volkswagen "Clean Diesel" Litig.*, 2017 WL 2258757, at *6; *Lougy*, 2016 WL 3067686, at *3; *Kalick v. Northwest Airlines Corp.*, 372 F. App'x 317, 320 (3d Cir. 2010). Such determinations are "fact-bound and situation-specific" and unlikely to govern "numerous" other cases. *Empire*, 547 U.S. at 700, 701. Moreover, the Coast Guard regulations arguably at issue here do not appear to give rise to "numerous" cases that could be governed even by a purely legal decision in this case. For example, a Westlaw search for the two regulations cited by name in the Petition—46 CFR §§ 185.506 and 185.508—revealed only *one* case citing either. And even in that lone case, the parties did not dispute the meaning or application of the regulation. *See Callahan v. Gulf Logistics, LLC*, Civ. No. 06-00561, 2017 WL 5492454, at *2 (W.D. La. Nov. 15, 2017). Thus, no federal issue presented by the State's claims is "substantial." *See Empire*, 547 U.S. at 700-01.

Second, the State's causes of action do not call into question the propriety or legality of any action by a federal agency. In *Grable*, "[t]he dispute . . . centered on the action of a federal agency (IRS) and its compatibility with a federal statute." *Empire*, 547 U.S. at 700. For that reason, the Federal Government had "a direct interest in the availability of a federal forum to vindicate its own administrative action." *Grable*, 545 U.S. at 315. Here, in contrast, the State's claims do not allege any misconduct by the Federal Government but only misconduct by private parties, *i.e.*, Defendants and their employees and agents. *See* Doc. 1-1. Thus, the State's claims do not present a substantial federal issue. *See Empire*, 547 U.S. at 700 (distinguishing *Grable*

because *Empire* did not call into question validity of federal action); *Maxwell*, 2011 WL 4014327, at *2 (holding that an MMPA claim did not establish federal jurisdiction where it "involve[d] the action of a private defendant, not a federal agency").

Third, the federal issues arguably invoked by the State's claims would not be "dispositive of the case." *Empire*, 547 U.S. at 700. As described in Part I.B.1, the State need not establish any violation of federal law to prevail in this case. And even if the State were to establish violations of federal law, it would still need to establish other elements of its MMPA claims in order to prevail. *See* Mo. Rev. Stat. §§ 407.020, 407.100. Thus, the resolution of federal issues is not dispositive of the case. For this reason as well, the State's claims do not present a substantial federal issue. *Empire*, 547 U.S. at 700. Defendants cannot satisfy the third prong of *Grable*, and the Court lacks subject-matter jurisdiction.

4. The exercise of federal jurisdiction over the State's claims would severely disrupt the congressionally approved balance of state and federal judicial responsibilities.

"[E]ven when the state action discloses a contested and substantial federal question, the exercise of federal jurisdiction is subject to a possible veto. For the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable*, 545 U.S. at 313-14. Here, the exercise of federal jurisdiction over the State's claims would severely disrupt the congressionally approved balance of state and federal judicial responsibilities.

First, finding that the State's passing references to provisions of federal law creates federal jurisdiction would result in numerous additional, complex, and time-intensive matters being litigated in federal court. Setting aside actions brought by private plaintiffs, States routinely bring

consumer-protection actions that—like the State's claims here—reference federal law. *See, e.g.*, *In re Volkswagen "Clean Diesel" Litig.*, 2017 WL 2258757, at *10; *In re Lifelock, Inc., Litig.*, 2009 WL 2222711, at *5; *West Virginia ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984 (S.D. W. Va. 2012). Finding that this case establishes federal jurisdiction would result in numerous other state-law consumer-protection actions initiated by State Attorneys General being litigated in federal court. It would "open the federal courthouse to any number of state law causes of action that invoke a federal standard or stand against the backdrop of a federal regulatory scheme." *Pennsylvania v. Eli Lilly & Co.*, 511 F. Supp. 2d 576, 586-87 (E.D. Pa. 2007). These effects would substantially disrupt Congress's approved balance of state and federal judicial responsibilities. *See Hawai'i v. Abbott Labs.*, 469 F. Supp. 2d at 857 ("Allowing federal jurisdiction here, where only a federal standard is implicated, would likely lead to many other cases in unrelated matters being regularly removed to federal court.").

Second, because this case involves claims brought by the State of Missouri in its sovereign capacity, exercising federal jurisdiction would raise especially significant federalism concerns. "The Supreme Court has colorfully noted that 'considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.'" *Pennsylvania v. Eli Lilly*, 511 F. Supp. 2d at 586 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22 n. 22 (1983)). "[T]he State's interest in hearing claims based on its own laws in its own courts weighs heavily in favor of retained state jurisdiction." *West Virginia ex rel. McGraw*, 842 F. Supp. 2d at 1002.

Third, the overwhelming majority of the issues raised by this case involves questions of state law. Asserting federal jurisdiction over this case—and others like it—will unnecessarily burden the federal courts with resolving numerous questions of state law. *See Pennsylvania v. Eli*

Lilly, 511 F. Supp. 2d at 587. Moreover, it would undermine Missouri's "interest in developing its law." *Id.* For these reasons, the exercise of federal jurisdiction over this case would severely disrupt the congressionally approved balance of state and federal judicial responsibilities. The Court lacks subject-matter jurisdiction and should remand the case to state court.

II. The Court should award costs and fees under 28 U.S.C. § 1447(c).

In addition to remanding this matter to state court, the Court should order Defendants to pay the State's costs and fees incurred as a result of Defendants' removal of this matter to federal court. Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). This fee-shifting provision serves an important purpose. "The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources. Assessing costs and fees on remand reduces the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005).

When determining whether to order costs and fees under § 1447(c), the Court must consider whether "the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141. To order costs and fees, the Court need not find that the removal was "frivolous, unreasonable, or without foundation." *Id.* at 138. "[T]he Court does not consider the removing defendant's motive, but instead must consider the objective merits of removal at the time of removal, irrespective of the ultimate remand." *Nguyen v. Outfield Brewhouse, LLC*, Case No. 4:17-cv-00973, 2017 WL 3085325, at *3 (E.D. Mo. July 19, 2017) (quotation omitted).

Here, Defendants lacked an objectively reasonable basis for removing this case to federal court. As described above, the complete-preemption doctrine plainly does not apply in this case,

and the State's MMPA claims plainly do not give rise to federal-question jurisdiction. The relevant facts and law dictating these conclusions were fully available to Defendants when they filed their removal papers. If the Court enters an award under § 1447(c), the State respectfully requests an opportunity to submit a detailed fee application at that time. *See Davis v. MCI Communications Servs., Inc.*, 421 F. Supp. 2d 1178, 1187 n.8 (E.D. Mo. 2006).

CONCLUSION

For the reasons stated above, the Court should remand this case to state court and award the State its costs and fees under 28 U.S.C. § 1447(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all counsel of record by operation of the Court's electronic filing system on September 24, 2018.

/s/ D. John Sauer